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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1983

RALPH DEWAYNE FRANKS
KATHRENA JUNE FRANKS ..... *Petitioners*

v.

UNITED STATES OF AMERICA ..... *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Whether the Government violated the defendants' substantive due process rights by indicting them under 26 U.S.C. §7206(1) for violating the Currency and Foreign Transactions Reporting Act, 31 U.S.C. §1121 (1972), where the effect of prosecution under the Internal Revenue Code was to eliminate a *scienter* requirement determined to be essential to prosecution under the Reporting Act itself, and where the duty to report financial interests in foreign bank accounts was never created by the Internal Revenue Code or regulations promulgated under that Code, but was incorporated into individuals' tax returns as an informational item for a brief time as a matter of administrative convenience to the Treasury Secretary.

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IN THE

Supreme Court Of The United States

October Term, 1983

NO. _____

RALPH DEWAYNE FRANKS
KATHRENA JUNE FRANKS ..... *Petitioners*

v.

UNITED STATES OF AMERICA ..... *Respondent*

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit in its order affirming the conviction of petitioners for violations of 26 U.S.C. §7201 and §7206(1).

OPINIONS BELOW

The opinion of the Tenth Circuit Court of Appeals has not yet been published. It appears in its entirety at Appendix A.

The trial court entered no opinion.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals (App. A, infra, pp. A-1 — A-13) was entered on December 27, 1983. Defendants filed a timely motion for rehearing on January 7, 1984, which was denied January 18, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Constitution of the United States, Amendment Five; provisions of the Internal Revenue Code, *viz.* 26 U.S.C. §§951, 7201, 7206(1); provisions of the Currency and Foreign Transactions Reporting Act of 1971, *viz.* 31 U.S.C. §§1052(k), 1058, 1059, 1121; the Federal Criminal Code, *viz.* 18 U.S.C. §1001; and Regulations promulgated by the Secretary of the Treasury pursuant to the Currency and Foreign Transactions Reporting Act, *viz.* 31 C.F.R. §§103.24, 103.49(c). These are reprinted in pertinent part in Appendix B, pp. A-14 — A-19.

STATEMENT OF CASE

On April 15, 1981, the Government obtained an Indictment charging Dewayne and Kathrena Franks with two counts of conspiracy to commit tax evasion, three counts of making false statements on their tax returns, and two counts of tax evasion. Before trial, defendants moved to dismiss the counts charging conspiracy, and they were stricken from the Indictment.

Defendants objected to the joinder of charges against them for the false statements (in violation of 28 U.S.C. §7206) and tax evasion (26 U.S.C. §7201). Defendants also objected to having been charged for false statements under 26 U.S.C. §7206, under the particular circumstances of the case, because the false statements alleged to have been made were defendants' denials that they had signatory authority over any foreign bank accounts. Defendants protested that such reports were required under 32 U.S.C. §1121, which had its own enforcement provisions, intended by Congress to be exclusive in application. These motions to strike were overruled.

The Government moved the amended Indictment to trial September 21, 1981. In answer to the charge that they had made false statements on their tax returns, defendants showed that for nearly thirty years they had depended on the services of professional tax preparers, and that for the returns in question, had used a Vinita, Oklahoma, public accountant, Huber Carr. Mr. Carr testified that he was completely unfamiliar with the requirement that interests in foreign accounts be reported. He assumed that the Franks had none, prepared their return showing that they had none, and sent the completed return and schedules back to them for signing and filing. The first such return they did file reported $105,000 of commission income, all of which had been earned in Canada, and disbursed to the Franks through the accounts over which they had signatory authority.

In answer to the Government's charge that they had filed two returns which evaded taxes due the United States, the Franks contended that their income was not understated, as the Government contended, because they had to make substantial cash payments over and above invoice price to a Canadian supplier in order to induce him to sell scarce oil pipe. It was, in fact, the Canadian Government's investigation of this businessman, Michael Dym, that first produced the Franks as subjects of a criminal tax investigation, and even then, initially, only as witnesses. Before and during the trial, the Government conceded that cash payments in excess of $700,000 over invoice had been made by the Franks to Dym. The Government questioned some $240,000 in claimed cash payments, and based its case of evasion on this allegedly unreported income. Defendant Kathrena Franks, the family bookkeeper, testified to and explained the documentation regarding these cash transactions.

The jury were instructed that they could find defendants guilty of making false statements under oath in violation of 26 U.S.C. §7206 if they were to find that the Franks subscribed their tax return saying that they had no signatory authority over a foreign bank account, when in fact they had. The jury were not instructed that it must have been proved that the Franks knew about the requirement that such interests be reported on their tax return. The jury convicted the Franks of Counts I, II and V of the amended indictment, charging violations of 26 U.S.C. §7206.

The jury also found the Franks guilty of Counts III and IV, charging violations of 26 U.S.C. §7201.

The defendants appealed their convictions to the United States Court of Appeals for the Tenth Circuit, which affirmed the convictions, but modified the sentence imposed by the district court, to the extent of declaring restitution of $200,000 in addition to the eighteen month prison sentences which were imposed. Defendants filed a timely notice of appeal on January 27, 1984.

REASONS PETITION SHOULD BE GRANTED

Congress did not intend the violations of the "Currency and Foreign Transactions Reporting Act", 31 U.S.C. §1121, P.L. 91-508, be prosecuted under the penal statutes of the Internal Revenue Code. The false statements provision of the Internal Revenue Code, 26 U.S.C. §7206(1), broadly condemns the signing of any return which the taxpayer believes not to be true as to any material matter. This general statute predates 31 U.S.C. §1121, which was passed in 1970 to require Americans to report certain banking and currency transactions in foreign lands. Violations of the Internal Revenue Code brought under §7206(1) are felonies. Violations of the Foreign Transactions Reporting Act may be either misdemeanors or felonies, 31 U.S.C. §1058. Thus, we have an earlier general act, followed by a later special act, each act comprising a definition for an offense and prescribing a penalty for it. Under settled principles, the later act removes such offenses as are covered by it from the operation of the earlier gen-

eral act. *United States* v. *Tynen,* 11 Wall. 88 (1869); Lewis, *Sutherland on Statutory Construction* §252. Then, too, the Foreign Currency Act prescribed a lesser penalty and "in construing penal statutes it is the rule that later enactments repeal former ones practically covering the same acts, but fixing a lesser penalty". *United States* v. *Yuginowich,* 256 U.S. 456 (1921).

The conclusion that the penal sections of the Internal Revenue Code were specifically not meant to be an enforcement mechanism for the "Currency and Foreign Transactions Reporting Act" is further buttressed by P.L. 91-508 §203(k)[1] which holds that knowingly false reports should be prosecuted under 18 U.S.C. §1001. 31 U.S.C. §1052(k). The Congress did *not* declare that violations of the duty to report interests in foreign bank accounts should be punishable under the Internal Revenue Code, 26 U.S.C. §7206(1), even though it was clearly contemplated that citizens should be asked about these accounts on their tax return. The reason for making the tax return the vehicle for reporting interests in foreign accounts was administrative *convenience.* House Report (Banking and Currency Committee) No. 91-975, §241 (1970), U.S. Code Congressional and Administrative News, p. 4408. The Congress and the Treasury Secretary were all concerned that the record keeping and reporting system not be burdensome to business. Thus, the House Report concludes: "The initial implementation of this chapter may very possibly be limited to a requirement that those

[1]This statute is cited as P.L. 91-508 §203(k) since this particular section was dropped . . . without explanation, when the Act was re-codified in 1982. This section was in force at all relevant times.

under a duty to file Federal income tax returns include in the return information as to the existence of any relationship which the taxpayer has with a foreign financial agency.". *Id.* The requirement to report this data as a part of one's individual tax return was dropped in 1977, a separate Treasury Department informational return being designated as the proper means by which such data were to be transmitted to the Treasury (T. 1570-1573).

The Court in *United States* v. *Levy,* 533 F.2d 969 (5th Cir. 1976) recognized this problem, albeit indirectly, when it considered whether a citizen could be convicted under 26 U.S.C. §7206 for having falsely filed a report which was never authorized by the Internal Revenue Code. They decided "We are of the opinion that Congress intended the criminal sanctions imposed by §7206(1) to apply to any statement or document required by the Internal Revenue Code or by any regulation lawfully promulgated for the enforcement of the Code." *Id.* at 974-75, *citing* 26 U.S.C. §6011.

In *Levy,* the Court found that there was no authority within the Internal Revenue Code or the regulations promulgated thereunder for an IRS Form known as Form 433-AB, and determined that the defendant could not be punished under §7206(1) for filing a falsified Form 433-AB. In the present case, Form 4683 and foreign banking information is not required to be filed with the Internal Revenue Service by the Internal Revenue Code, or by regulation promulgated for the enforcement of the Code. The failure properly to file this form, or even, in the case of *Levy,* to file false state-

ments with such a form, cannot be the basis of a prosecution under §7206(1) of the Internal Revenue Code.

Levy only begins to suggest the myriad problems, some implicating substantial due process concerns, which attend permitting the Government to prosecute violations of the Foreign Transaction Reporting Act under the Internal Revenue Code. The most serious of these is that the standard of proof and *scienter* requirements designated by Congress in the statutes which created the duty to report foreign accounts are significantly diluted when prosecution is commenced under 26 U.S.C. §7206(1).

Both the Congress, by statute (31 U.S.C. §1058), and the Secretary, by regulation (31 C.F.R. §103.49(c), 37 F.R. 6912, 6915), imposed special penalties on those who would fail to make the required reports or who would ". . . knowingly and [wilfully] make any false, fictitious, or fraudulent statement . . . in any report required by this part . . . "[2] In creating a special crime to deal with the problem of unreported interests in foreign bank accounts, Congress created *scienter* requirements for prosecution under 31 U.S.C. §1059 which differ from charges brought under 26 U.S.C. §7206(1). Under 31 U.S.C. §1059, a person may only be subjected to criminal liability if he acts wilfully *and* knowingly; un-

[2]The enforcement statute 31 U.S.C. §1059 did not specifically proscribe filing false statements. The Secretary, in his regulations, incorporated 31 U.S.C. §1052(k)'s admonition that such filings could be prosecuted under 18 U.S.C. §1001. The Secretary's informational regulation reflected his understanding that such matters were not intended to be prosecuted under the Revenue Code, and is deserving of weight, particularly in the circumstances of this case.

der 26 U.S.C. §7206(1), a person may be convicted upon a showing of only wilful intent. Significantly, the *scienter* requirements of 31 U.S.C. §1059 are identical to those of 18 U.S.C. §1001, the one penal section which Congress specifically related could be an alternative mode of prosecution. [31 U.S.C. §1052(k).] Since the Government was allowed to proceed under §7206(1), the trial court instructed the jury, with reference to Counts I, II, and V, that they need only be satisfied that the defendants acted wilfully in failing to report their foreign accounts (T. 1924-1930). At no point did the jury learn that they need be satisfied beyond a reasonable doubt that defendants acted in wilful disregard of a known legal duty.

Of course, the crux of the Franks' defense to Counts I, II, and V of the Indictment was that they were unaware of the requirement that foreign accounts be reported. Because the Government proceeded under §7206(1), which does not require the United States to show that the defendants knowingly violated the law, the defendants were denied an instruction which would have placed their theory of defense squarely before the jury. The testimony of Huber Carr, a Vinita, Oklahoma, public accountant who prepared the Franks' return, showed that he himself was unaware of the reporting requirement, never brought his clients' attention to it, assumed that his clients had no foreign accounts, and prepared their return on that assumption, sending it back to them for signing and filing (T. 209-210).

There can be scant doubt that if this prosecution were brought under 31 U.S.C. §1059, the conduct of the trial would have been significantly altered in favor of the Franks. *United States* v. *Granda*, 565 F.2d 922 (5th Cir. 1978) was a §1059 prosecution for a violation of that part of the Currency and Foreign Transactions Reporting Act requiring parties entering or leaving the United States to report whether they are carrying currency in excess of $5,000 on their persons. In *Granda*, the defendant was returning from a trip to Panama. She presented her customs declaration to the officer. Similarly to the situation experienced by the Franks, another person had prepared her customs declaration, which she had signed. In relevant part, the declaration denied that Granda was carrying more than $5,000 cash on her. She actually carried $10,000. Granda contended on appeal that since §1059 required both a knowing and wilful violation of the law, her failure to comply with the statute was not criminal unless it were proved that she knew of the legal requirement to report how much money she was carrying, and acted with the specific intent to circumvent these requirements. *Id.*, at 924. The Fifth Circuit agreed, reversing and dismissing the case against her.

The defendants were prejudiced in four ways when the court overruled their Motion to Strike Counts I, II, and V of the Indictment. First, the Government was allowed to proceed to judgment on those counts under a lesser showing of *scienter* than the law which raised the duty in the first place required. Second, the Government was allowed illegally to "pyramid" punishment because, in addition to the fines and imprisonment

which the trial court imposed on the Franks for evasion in Counts III and IV, the trial court imposed fines and special conditions of probation on the Franks for having violated 26 U.S.C. §7206(1). The rationale was that misreporting the existence of foreign bank accounts was a separate transgression from misreporting income, and might separately be punished. Ordinarily, convictions under 26 U.S.C. §7206(1) merge into convictions obtained under 26 U.S.C. §7201. *United States* v. *White,* 417 F.2d 89 (2d Cir. 1969).

As greviously prejudicial as these circumstances were, the Franks experienced yet deeper prejudice in the conduct of the trial arising out of the trial court's failure to strike Counts I, II, and V of the Indictment. First, the jury was allowed to conclude that the Franks were "perjurers" because neither they nor their professional tax preparer had taken due note of the highly technical reporting requirement, the existence of which was generally unknown in the area of Vinita, Oklahoma, where they lived and worked. It is submitted that such a finding significantly tended to prejudice the jury's assessment of credibility when they were asked to determine whether the Franks had made all of the cash payments to Michael Dym that they had insisted had been made.

Far more grevious than that, however, was the widened admissibility of irrelevant and confusing evidence which the §7206(1) prosecution for failing to report foreign accounts allowed the Government. This evidence consisted of schedules of *gross deposits* into accounts maintained by the Franks in Canada and Ber-

muda. Such deposits are not (and were never contended to be) gross income. Some were in the nature of escrow. Nor were the deposits contended to be net income, for the cost of goods sold were never deducted from the deposit prior to submission. The evidence of these deposits into one corporate account over which they had signatory authority totalled $1,367,912.11 in 1974 (related to Counts I, III, and V) and $1,762,247.29 in 1975 (related to Counts II and IV). This evidence was highly prejudicial to the defendants on the counts charging evasion (Counts II and IV) since it made the Franks appear to be persons of considerable unreported wealth and resources, though it had no tendency at all to prove that they were therefore liable for a deficiency.

The Government insisted that admission of the evidence of gross deposits was crucial to show that the defendants knew that they had foreign bank accounts (T. 795). That was never an issue. Defendants never denied that they knew that they had foreign bank accounts. Their contention was that they were ignorant of the duty to report the existence of these accounts.

Under the broadened evidentiary admissibility allowed, Government witness Thomas Henry testified about deposits into the Bermuda bank accounts of the Bermudan corporation, Franco, Ltd. These deposits were never traced to the defendants as income. The issue, instead, was whether the proceeds from the sale of pipe should be considered as Franco Ltd.'s or as the personal income of the Franks. To show that it was the personal income of the Franks, the Government relied on records of their own personal bank account in Vinita

(T. 479ff, 486, 499ff), not the records of bank statements of Franco Ltd.'s Bermuda bank.

Evidence of gross deposits into the accounts of Franco, Ltd., introduced over the objections of the defendants (Tr. 478, 491ff), had no value other than to prejudice the jury on the charges of evasion. As this trial demonstrates, this is a natural concomitant of holding that one may be prosecuted under the Internal Revenue Code both for evasion and for failing to make Foreign Transaction reports mandated by 31 U.S.C. §1121: the Government gets to prove knowledge of the existence of the account by introducing large numbers of deposit tickets with impressive amounts on them. These numbers are irrelevant to evasion; yet the jury are told by way of limitation that they may consider such evidence if they believe it to be income to the Franks (T. 483).

The jury, then, were instructed that they could find the Franks guilty of "perjury" even though there was no burden upon the Government to show that they were aware of their duty to make such reports. Having come to a conclusion that the defendants were perjurers, made artifically easy by a relaxed *scienter* requirement, the jury were then asked whether to believe the contentions of the Government that the Franks owed a tax deficiency, or to believe the words of "perjurers" that they had had to make significant cash payments over invoice price to a foreign distributor of scarce oil pipe during the Energy Crisis of 1974-75. This would ordinarily be a hardly implausible story, if it were to be given by a person whose word has not unfair-

ly been tainted. Finally, the Franks were required to present their defense in the face of evidence of millions of dollars in "deposits", the cumulative effect of which was only to prejudice the jury to believe that the defendants had a lot of money, despite the Government's contention that it was not imputing the earnings of Franco, Ltd. to the Franks under §951 of the Revenue Code.

CONCLUSION

The prejudice sustained by the Franks had one root: the unfair prosecution of a currency act violation under the Internal Revenue Code. As *Levy* v. *United States, supra,* shows, the Circuit Courts are extremely troubled by notions that the Treasury is unrestricted in the information it may lawfully obtain under peril of the penal sanctions of the Internal Revenue Code. Because the history and structure of the Currency and Foreign Transactions Reporting Act shows that it was not intended by Congress to be the subject of a Revenue prosecution, a writ of certiorari should issue to the Tenth Circuit ordering it to grant the Franks a new trial on all counts of the Indictment, such counts, however, being modified to prevent prosecution for failure to make 31 U.S.C. §1121 reports.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, E. J. Ball, one of the attorneys of record for the Petitioners, Ralph Dewayne Franks and Kathrena June Franks, state on oath that I did on the 16th day of March, 1984, serve 3 copies of the original printed Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit, and further, have on this 29th day of March, 1984, served 3 copies of the revised printed Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit upon the following:

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/s/ E. J. Ball

Appendix

APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 81-2309 and 81-2310

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

RALPH DEWAYNE FRANKS and
KATHRENA JUNE FRANKS,
Defendants-Appellants.

Appeal from the United States District Court
For the Northern District of Oklahoma
(D.C. No. 81-CR-31-BT)

E. J. Ball of Ball, Mourton & Adams, Fayetteville, Arkansas (Thomas D. Frasier of Frasier, Frasier & Gullekson, Tulsa, Oklahoma, with him on the brief), for Defendants-Appellants.

Deborah Wright Dawson (Michael L. Paup and Robert E. Lindsay, Attorneys, Tax Division, Department of

Justice, Washington, D.C.; Glenn L. Archer, Jr., Assistant Attorney General; and Of Counsel: Francis A. Keating, II, Tulsa, Oklahoma, with her on the brief), for Plaintiff-Appellee.

Before McWILLIAMS, McKAY, and LOGAN, Circuit Judges.

McWILLIAMS, Circuit Judge.

Ralph Dewayne Franks and Kathrena June Franks, husband and wife, were jointly charged in a five count indictment with criminal violations of the Internal Revenue Code. A jury convicted both defendants on all counts, and the defendants appeal the sentences imposed thereon.

Perhaps the primary ground for reversal is that there is an overlap between the five counts in the information, and that, in effect, the defendants were prosecuted and punished more than once for the same transaction. Accordingly, the five counts in the indictment and the sentences imposed on each must be examined in detail.

Count I of the indictment charged the defendants with a violation of 26 U.S.C. § 7206(1) in connection with their joint Income Tax Return, Form 1040, for the calendar year 1974. The charge was that the defendants knowingly made and subscribed to a return which was verified by a written declaration that it was made under the penalties of perjury, which return the defendants

did not believe to be true and correct as to every material matter, in that the defendants, *inter alia*, did not acknowledge or report eight foreign bank accounts in Canada and Bermuda in which they had an interest and over which they had signatory authority.

Count II related to defendants' joint income tax return for the taxable year 1975. That count also charged the defendants with violation of 26 U.S.C. § 7206(1), and the allegations therein parallel the charge in Count I. Specifically, in Count II the defendants were charged with making and subscribing to an income tax return under penalty of perjury which they did not believe to be true and correct as to every material matter, in that they, *inter alia*, did not acknowledge or report at least two foreign bank accounts in which they had an interest and over which they had signatory authority.

Count III charged the defendants with willfully and knowingly attempting to evade and defeat the income tax due and owing the United States for the calendar year 1974. More specifically, in Count III the defendants were charged with filing a false and fraudulent joint income tax return wherein it was stated that their taxable income for the year was $140,332.83, with a tax thereon amounting to $53,239.27, whereas, in fact, their taxable income for the year was $516,682.83 upon which a tax in the sum of $203,013.86 was due and owing, in violation of 26 U.S.C. § 7201.

Count IV concerned the defendants' joint income tax return for 1975. This count also charged a violation

under 26 U.S.C. § 7201. The charge under this count was that the defendants knowingly attempted to evade and defeat tax due and owing the United States by filing a false and fraudulent return wherein it was stated that their taxable income for 1975 was $2,899.-56, with a tax thereon amounting to $198.62, whereas in fact their joint income for that year was $153,760.50 upon which tax in the amount of $65,576.15 was due and owing.

Count V pertains to a joint amended income tax return filed November 26, 1974. It charged a violation of 26 U.S.C. § 7206(1). Specifically, the defendants were charged with knowingly making and subscribing to an Amended United States Individual Income Tax Return, Form 1040X, which was under the penalty of perjury and which they did not believe to be true and correct as to every material matter in that, although they indicated that they had an interest in and authority over certain identified foreign bank accounts, they did not acknowledge or report four other foreign bank accounts in which they had an interest and over which they had signatory authority.

As stated, both Mr. and Mrs. Franks were convicted on all five counts, and each received the same sentences. Each was sentenced to eighteen months imprisonment on Counts III and IV, the two counts which charged violations of § 7201 for the years 1974 and 1975, respectively, with the sentence on Count IV to be served concurrently with the sentence imposed on Count III. Further, each defendant was fined $10,000 on each count.

As to Counts I, II, and V, the counts charging a violation of § 7206(1), the imposition of sentence was suspended, and the defendants were placed on probation for a period of three years. Further, on each of these three counts, as a condition of probation, each defendant was fined $5,000.

As an additional and special condition of probation, each of the defendants was ordered "to make restitution to the United States in the amount of $100,000, payable in three (3) equal installments, due on the last day of each year of probation." It is from these sentences that the defendants appeal.

Mr. and Mrs. Franks, residents of Big Cabin, Oklahoma, had numerous business interests in which both were actively involved. During the period in question, 1974 and 1975, the Franks owned the Cherokee Truck Terminal, Inc., a domestic corporation; the Cherokee Restaurant, a domestic corporation; Franks and Son, a domestic corporation; Franks Operating and Distributing Co., a partnership; and Can Am Distributing and Warehouse, Inc., a trucking concern in which the Franks were 50% owners and officers and directors from May 1973 to May 1974. In 1973, the Franks entered into a new business selling and brokering oil field drilling pipe and couplings. This business was conducted as individuals and on behalf of Franks and Son, Cherokee Truck Terminal, and Can Am Distributing and Warehouse, Inc. The Franks also owned Franco, Ltd., a Bermuda corporation, the stated business of which was brokering oil and drilling pipe supplies.

The Franks had an interest in or signatory authority over a total of eight foreign bank accounts during 1974 and 1975, which included banks in Canada and Bermuda. The net deposits in these accounts totalled $3,770,723.09 in 1974 and $1,666,724.73 in 1975.

I. Motion to Strike

Prior to trial, the defendants filed a motion to strike all references in Counts I, II, and V relating to foreign bank accounts and their alleged failure to report and identify the existence of such. This motion was denied, and, on appeal, the defendants argue that the ruling of the trial court is reversible error. We do not agree.

The defendants' argument is that the question on the 1974 income tax return concerning the existence of foreign bank accounts, and Form 4683, which form was used and completed by the defendants in their amended tax return for 1974 and their return for 1975, are not authorized by any statute in the Internal Revenue Code, nor by any regulation promulgated by the Internal Revenue Service. In this regard, the defendants correctly point out that the authority for requiring a report of foreign bank accounts is 31 U.S.C. § 1121, which deals with Money and Finance, and that it was the Secretary of the Treasury who promulgated a regulation, 31 C.F.R. § 103.24, requiring a person to report foreign bank accounts on his federal tax return. However, we do not believe that such fact has any present pertinency. In thus arguing, the defendants rely

heavily on *United States* v. *Levy*, 533 F.2d 969 (5th Cir. 1976). We are not persuaded by *Levy*.

Counts I, II, and V of the indictment charged, in essence, that the two defendants knowingly made and subscribed to an income tax return for the years 1974 and 1975 and to an amended income tax return for the year 1974, which they did not believe to be true and correct as to every material matter, in that they failed to correctly identify foreign bank accounts in which they had an interest in and over which they had signatory authority. In this regard, the defendants in 1974 filed a Form 1040, which form contained the following question: "Did you, at any time during the taxable year, have any interest in or signature or other authority over a bank, securities, or other financial account in a foreign country (except in a U.S. military banking facility operated by a U.S. financial institution)?". The defendants answered that question "No." The evidence was that in fact they did have such interests in 1974.

The amended return for 1974, filed in November 1975, was filed for the stated purpose of correcting their earlier answer concerning foreign bank accounts contained in their original tax return for 1974. Attached to their amended return was a Form 4683 which was required in the event the taxpayer had foreign banking interests. In this particular connection, the evidence at trial was that this Form 4683 filed by the defendants did not list *all* of their foreign accounts over which they had control.

Similarly, as concerns their 1975 tax return, the defendants again attached to their personal income tax return a completed Form 4683, which listed some, but not all, of their foreign bank accounts.

Like the Fifth Circuit, in cases decided subsequent to *United States* v. *Levy, supra,* we do not believe the rationale of *Levy* should be extended, and, in our view, such does not apply to the schedules here appended to a Form 1040, or to an answer made in response to a question contained in the Form 1040. *United States* v. *Damon,* 676 F.2d 1060 (5th Cir. 1982); *United States* v. *Taylor,* 574 F.2d 232 (5th Cir.), *cert. denied,* 439 U.S. 893 (1978); *accord, United States* v. *Hajecate,* 683 F.2d 894 (5th Cir. 1982), *cert. denied,* 103 S. Ct. 2086 (1983). In the instant case, it is clearly established that the defendants in their 1974 tax return gave a false answer to a direct question concerning their interest in foreign bank accounts, and that they attached to their amended tax return for 1974 and their tax return for 1975 a completed Form 4683 which did not identify *all* of the foreign bank accounts over which they had signatory authority. Such, in our view, comes within the purview of 26 U.S.C. § 7206(1). The district court did not err in denying defendants' motion to strike.

II. Motion to Elect

Prior to trial, the defendants also asked that the government be required to elect between prosecuting the defendants on Counts I and II, charging them with violation of 26 U.S.C. § 7206(1), or prosecuting them on Counts III and IV, charging them with violation of 26

U.S.C. § 7201. The district court denied the motion, and this ruling is now assigned as error. We find no error.

Counts I and II are not, as the defendants suggest, duplicative of Counts III and IV. The latter counts charge the defendants with an attempt to evade tax due the United States for the years 1974 and 1975. The former counts charge, *inter alia*, the defendants with subscribing to a tax return for the years 1974 and 1975 wherein they knowingly failed to identify foreign bank accounts which they owned. Counts III and IV are not identical to Counts I and II.

For reasons that we shall discuss *infra*, Counts I and II are not, in our view, even lesser included offenses to Counts III and IV. But even if they were, such would not require an election. *United States* v. *White*, 417 F.2d 89 (2d Cir. 1969) and *United States* v. *Lodwick*, 410 F.2d 1202 (8th Cir.), *cert. denied*, 396 U.S. 841 (1969).

III. Pyramiding Sentences

Defendants claim that even assuming there was no "double prosecution" resulting from the refusal of the district court to compel the government to elect between prosecuting the defendants on Counts I and II, or on Counts III and IV, there was nonetheless a "pyramiding" of sentences when the district court imposed separate and additional sentences on Counts I, II, III, and IV. We disagree.

The government agrees that *if* Counts I and II were truly lesser included offenses to the offenses charged in Counts III and IV, then the imposition of cumulative penalties on all four counts would be impermissible. *United States* v. *White, supra; United States* v. *Lodwick, supra;* and *Gaunt* v. *United States,* 184 F.2d 284 (1st Cir. 1950), *cert. denied,* 340 U.S. 917 (1951). In this regard, the Second Circuit in *White* observed as follows:

> The perjury offenses charged under § 7206 may separately form the basis for an indictment; but where proof of wilfully attempted evasion under § 7201 also proves, as an incident to the willful evasion, the preparing and subscribing of a fraudulent return, the specific form of fraudulent conduct merges into the inclusive fraud charged under § 7201. To cumulate penalties beyond the maximum authorized by § 7201 is, therefore, improper under these circumstances.

The government contends, however, that under the facts of this particular case, Counts I and II are not lesser included offenses to Counts III and IV. We agree. Counts III and IV charge an attempt to defeat the payments of taxes due the United States by filing false and fraudulent tax returns for the years 1974 and 1975, which substantially understated taxable income in violation of 26 U.S.C. § 7201. The charge in Counts I and II is that the defendants made and subscribed to tax returns for 1974 and 1975, which they did not believe to be true and correct as to every material matter in that they did not correctly identify the existence of

foreign bank accounts which they controlled, in violation of 26 U.S.C. § 7206(1). A misrepresentation of foreign bank account information is distinct and independent from an understatement of gross income. Failure by the taxpayer to identify an interest in a foreign bank account does not necessarily mean that the taxpayer understated his gross income. There was no double sentencing.

IV. Special Condition of Probation

As above stated, the district court placed both defendants on probation for three years as concerns their respective convictions on Counts I, II, and V. Certain conditions were imposed in connection with such probation, as well as a so-called "special condition." The special condition was that each defendant was required to make "restitution" to the United States for unpaid taxes in a total amount of $100,000 each, payable in three equal installments, due on the last day of each of the three years of probation. The authority for such special condition was apparently 18 U.S.C. § 3651.

The defendants claim that the figure of $100,000 was arbitrarily set by the court, and that there was no factual determination made at the trial of this case of the amount of tax that the defendants might owe the United States. The government is in substantial accord with the defendants on this particular matter. In a criminal prosecution for violations of the Internal Revenue Code, a defendant may not be required as a special condition of probation to pay a specific sum for unpaid taxes when the amount thereof has not been acknow-

ledged, conclusively established in the criminal proceeding, or finally determined in civil proceedings. *United States* v. *Touchet,* 658 F.2d 1074 (5th Cir. 1981); *United States* v. *Weber,* 437 F.2d 1218 (7th Cir. 1971); *United States* v. *Stoehr,* 196 F.2d 276 (3rd Cir.), *cert. denied,* 344 U.S. 826 (1952); and *United States* v. *Taylor,* 305 F.2d 183, 187 (4th Cir.), *cert. denied,* 371 U.S. 894 (1962). The special condition must be vacated.

V. Miscellaneous

At trial, the defendants' position was that although they had misrepresented their foreign bank account information, such misrepresentation was not willful. Apparently, in an effort to establish their ignorance of, and confusion about, foreign bank account reporting requirements, counsel offered evidence relating to the "history" of Form 4683 and Form 90-22.1. Such evidence was excluded by the trial court for lack of materiality. We find no abuse of discretion on the exclusion of this evidence. The materiality of such is doubtful. See *United States* v. *Brown,* 411 F.2d 1134, 1137 (10th Cir. 1969), and *United States* v. *Cohen,* 481 F.2d 840 (8th Cir. 1973).

Finally, the defendants assign as error a ruling of the trial court concerning the bank accounts of Franco, Ltd., located in Bermuda and Montreal, Canada. Franco, Ltd. was one of the numerous businesses owned by the defendant. Prior to trial and pursuant to agreement of counsel, the district court ruled that the government would not present evidence of Franco's net income for the purpose of imputing such to the defendants. At

trial, however, the district court did allow the government to present evidence of Franco's gross deposits in these accounts for the purpose of showing specific monies received by defendants from Franco. Such, in our view, did not violate the earlier pretrial order concerning Franks' net income. In any event, when viewed in the context of a seven-day trial, this particular matter is of the *de minimus* variety.

That part of the judgment which imposed the special condition of probation requiring the payment by each defendant of $100,000 to the United States as restitution is vacated, and, on remand, the district court is directed to eliminate such from its Judgment and Probation/Commitment Order. Otherwise, the judgments are affirmed.

Filed December 27, 1983
United States Court of Appeals, Tenth Circuit
Howard K. Phillips, Clerk

APPENDIX B

The United States Constitution, Amendment 5, says in pertinent part as follows:

> ". . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; . . . nor be deprived of life, liberty, or property, without due process of law; . . . "

United States Code §18-1001 says in pertinent part as follows:

> "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than 5 years, or both."

United States Code §26-6011 says in pertinent part as follows:

> "(a) General rule. — When required by regulations prescribed by the Secretary any person made liable for any tax imposed by this title, or for the collection thereof, shall make a return or statement according to the forms and regulations prescribed by the Secretary. Every person required to make a

return or statement shall include therein the information required by such forms or regulations.

(b) Identification of taxpayer. — The Secretary is authorized to require such information with respect to persons subject to the taxes imposed by chapter 21 or chapter 24 as is necessary or helpful in securing proper identification of such persons."

United States Code §26-7206 says in pertinent part as follows:

"Any person who —

(1) Declaration under penalties of perjury.

Willfully makes and subscribes any return, statement or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or

(2) . . . "

United States Code §31-1052 says in pertinent part as follows:

"(a) The definitions and rules of construction set forth in this section apply for the purposes of this chapter.

****

(k) For the purposes of section 1001 of Title 18 the contents of reports required under any provision of this chapter are statements and representations in matters within the jurisdiction of an agency of the United States."

United States Code §31-1058 says in pertinent part as follows:

"Whoever willfully violates any provision of this chapter or any regulation under this chapter shall be fined not more than $1,000, or imprisoned not more than one year, or both."

United States Code §31-1059 says in pertinent part as follows:

"Whoever willfully violates any provision of this chapter where the violation is —

(1) committed in furtherance of the commission of any other violation of Federal law, or

(2) committed as part of a pattern or illegal activity involving transactions exceeding $100,000 in any twelve-month period,

shall be fined not more than $500,000 or imprisoned not more than five years, or both."

United States Code §31-1121 says in pertinent part as follows:

"(a) The Secretary of the Treasury, having due regard for the need to avoid impeding or controlling the export or import of currency or other monetary instruments and having due regard also for the need to avoid burdening unreasonably persons who legitimately engage in transactions with foreign financial agencies, shall by regulation require any resident or citizen of the United States, or person in the United States and doing business therein, who engages in any transaction or maintains any relationship, directly or indirectly, on behalf of himself or another, with a foreign financial agency to maintain records or to file reports, or both, setting forth such of the following information, in such form and in such detail, as the Secretary may require:

(1) The identities and addresses of the parties to the transaction or relationship.

(2) The legal capacities in which the parties to the transaction or relationship are acting, and the identities of the real parties in interest if one or more of the parties are not acting solely as principals.

(3) A description of the transaction or relationship including the amounts of money, credit, or other property involved.

(b) No person required to maintain records under this section shall be required to produce or otherwise disclose the contents of the records ex-

cept in compliance with a subpoena or summons duly authorized and issued or as may otherwise be required by law."

31 C.F.R. §103.24, Reports of foreign financial accounts, says in pertinent part as follcws:

"Each person subject to the jurisdiction of the United States (except a foreign subsidiary of U.S. person) having a financial interest in, or signature or other authority over, a bank, securities or other financial account in a foreign country shall report such relationship as required on his Federal income tax return for each year in which such relationship exists, and shall provide such information concerning each such account as shall be specified in a special tax form to be filed by such persons."

31 C.F.R. §103.49, Criminal penalty, says in pertinent part as follows:

"(a) Any person who willfully violates any provision of this part may, upon conviction thereof, be fined not more than $1,000 or be imprisoned not more than 1 year, or both . . .

(b) Any person who willfully violates any provision of title II of Public Law 91-508, or of this part authorized thereby, where the violation is either

(1) Committed in furtherance of the commission of any other violation of Federal law, or

(2) Committed as part of a pattern of illegal activity involving transactions exceeding $100,000 in any 12-month period, may, upon conviction thereof, be fined not more than $500,000 or be imprisoned not more than 5 years, or both

(c) Any person who knowingly makes any false, fictitious or fraudulent statement or representation in any report required by this part may upon conviction thereof, be fined not more than $10,000 or be imprisoned not more than 5 years, or both."